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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92060308
Party	Defendant Corcamore, LLC
Correspondence Address	CORCAMORE LLC 1189 CRIM ROAD BRIDGEWATER, NJ 08807 UNITED STATES
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Charles L. Thomason
Filer's e-mail	thomason@spatlaw.com
Signature	/Charles L. Thomason/
Date	11/14/2014
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

SFM, LLC,	}	
	}	Cancellation No: 92 060308
v.	}	
	}	
Corcamore, LLC	}	Registration No. 3708453
	}	
Respondent-Registrant.	}	

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ELECTRONICALLY SERVED

**NOTICE OF  
MOTION OF RESPONDENT-REGISTRANT TO DISMISS.**

**TO:** Nicole M. Murray, Esq.  
Quarles & Brady LLP  
30 N. LaSalle St., Suite 4000  
Chicago, IL 60654  
Email: *Nicole.Murray[at]quarles[dot]com*

**PLEASE TAKE NOTICE** that the Respondent Corcamore LLC moves to dismiss the petition pursuant to TBMP Section 503, and to suspend proceedings pursuant to Trademark Rule 2.127(d) until this motion is resolved.

Reliance will be placed on the memorandum of points and authorities, along with the exhibits thereto.

Respectfully submitted,

14 NOV 2014

~S~ Charles L. Thomason  
Charles L. Thomason  
55 W. 12<sup>th</sup> Ave.  
Columbus, OH 43210  
Email: *Thomason[at]spatlaw[dot]com*  
Telep. (502) 349-7227  
Attorney for Respondent-Registrant

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of November, 2014, I electronically filed the foregoing Notice of Motion to Dismiss, and emailed a copy to the attorneys for the Petitioner, directed to the email address of the attorney indicated below:

Nicole M. Murray, Esq.  
Quarles & Brady LLP  
30 N. LaSalle St., Suite 4000  
Chicago, IL 60654  
Email: *Nicole.Murray[at]quarles[dot]com*

Date: 14 NOV 2014

~ S ~ /Charles L. Thomason/  
Charles L. Thomason

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	Petitioner,	}	Cancellation No: 92 060308
v.		}	
		}	
Corcamore, LLC		}	Registration No. 3708453
		}	
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**POINTS AND AUTHORITIES IN SUPPORT OF  
MOTION OF RESPONDENT-REGISTRANT TO DISMISS**

**FEW, IF ANY, WELL-PLEADED FACTUAL AVERMENTS.**

On a motion to dismiss, only the “well-pleaded” allegations of fact are taken as true.<sup>1</sup> In the Petition here, paragraph 3 is perhaps the only such averment.

3. Respondent registered the trademark SPROUT, Registration no. 3,708,453, for use in connection with “vending machine services” in International Class 35, on November 10, 2009.

Most all the other averments are form-book or formulaic, or parrot legal standards.

**ARGUMENT.**

**A. Petitioner Cannot State a Claim for Dilution.**

The Petition avers that any “contemporaneous use by Respondent” of its registered trademark “will dilute and impair” the three marks asserted by Petitioner, and cause those “to lose their distinctiveness,” etc.¶8. It is settled that the Petition must allege, and petitioner would have to prove, that the Respondent-registrant's “use of its mark began after the [*petitioner*]'s

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<sup>1</sup> *Doyle v. Al Johnson's Swedish Restaurant & Butik, Inc.*, 101 USPQ2d 1780 (TTAB 2012).

mark became famous.” *Coach Services, Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713 (Fed. Cir. 2012). The paragraph 8 averments should be dismissed pursuant to Rule 12(b)(6), FED. R. CIV. PROC. The petitioner did not allege its marks are famous, and in fact the petitioner could not allege that plausibly.

A “mere reference to” dilution in paragraph 8 “is insufficient to plead a dilution claim,” and the Petition here lacks any “allegation that the [*petitioner*]'s mark was famous prior to the earliest date on which the [*Respondent*] can rely for purposes of priority.” TBMP §309.03(c). Petitioner’s marks are not famous, and were not “famous prior to” the dates in Respondent’s registration. The “will dilute and impair” dilution claim, and all such averments in paragraph 8 of the Petition, should be dismissed.

Petitioner's blurring, diminishment and tarnishment claims, if well-pleaded at all, would too require the Petition to state an “association arising from the similarity between a mark or trade name and [*petitioner*]'s famous mark that impairs the distinctiveness of [*petitioner*]'s famous mark.” 15 U.S.C. § 1125(c)(2)(B). *Coach Svcs., supra*.

The petitioner's "allegation of dilution is legally insufficient" under the Trademark Act. *Trek Bicycle Corp. v. Styletrek Ltd.*, 64 USPQ2d 1540 (TTAB 2001). Dismissal of the paragraph 8 averments is justified. If paragraph 8 is the “injury” averred in paragraph 9, then that too fails.

**B. Under the Modern Standard, the Elements for Standing Were Not Pleaded.**

Precedential decisions regarding standing under Section 14 have required some averment “establishing a direct commercial interest.” *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945 (Fed. Cir. 2000). Here, only an indirect interest is suggested, and none is pleaded. Other rulings indicate generally that “Section 14 has been interpreted as requiring a cancellation petitioner to

show (1) that it possesses standing to challenge the continued presence on the register of the subject registration and (2) that there is a valid ground why the registrant is not entitled under law to maintain the registration.” *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752 (Fed. Cir. 1998), citing, *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1026, 213 USPQ 185, 187 (CCPA 1982).<sup>2</sup>

What petitioner must plead, and prove, to indicate it possesses standing under Section 14 must conform to the recent holding in of *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, \_\_\_ U.S. \_\_\_, 134 S.Ct. 1377, 188 L.Ed.2d 392, 109 USPQ2d 2061 (2014). The “reasonable interest” and other previously-used standards for Lanham Act standing were replaced with a two factor test, the essentials of which must be well-pleaded. “In short, we think the principles set forth [*there*] will provide clearer and more accurate guidance than the ‘reasonable interest’ test.” *Id.*, 134 S.Ct. at 1393.

The statutory basis for standing to plead a Section 14 action specifies that pleader must be a “person who believes that he or she is or is will be damaged.” 15 U.S.C. §1064. This statement of the zone of interest for a claimant to show standing is nearly verbatim to that in Section 43(a), which enables a pleading by “any person who believes that he or she is or is likely to be damaged” by acts contemplated by that provision. 15 U.S.C. §1125(a)(1)(B). The one textual difference is that Section 14 does not use “likely to be,” but amplifies that with “is or will be” damaged. This textual difference bears on how the two prongs of the *Lexmark* ruling impact the standing question in a Section 14 cancellation action.

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<sup>2</sup> The opposite proposition is that Section 18 has been interpreted to permit a counterclaim for the marks of the cancellation petitioner to be narrowed, or for the Board to “otherwise restrict or rectify” those marks in regard to the identification of services, so as to remove the alleged likelihood of confusion. *Eurostar Inc. v. “Euro-Star” Reitmoden GmbH & Co.*, 34 USPQ2d 1266, 1271 (TTAB 1994).

Earlier this year, the Supreme Court ruled that standing to bring a Section 43(a) claim must be pleaded and proved. As *Lexmark* applies here, Section 14 requires two elements of standing to be pleaded in a cancellation action. Respondent urges dismissal here, because the Petition does not plead the essential matters needed under *Lexmark* to establish standing in a Lanham Act case.

The Court in *Lexmark* began from the premise that a “statutory cause of action extends only to [those] whose interests fall within the zone of interests protected by the law invoked.” Citing *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). *Lexmark*, 137 S.Ct. at 1388. It then considered the “zone of interests” encompassed by statutory phrase in Section 43(a), and again, Section 14 has practically the same legislative expression. “We thus hold that to come within the zone of interests ... [the pleader] must allege an injury to a commercial interest in reputation or sales. *Id.*, at 1390. That is not found in the Petition here.

Based on that statute-based, zone-of-interests test, the Court “h[e]ld that a plaintiff suing under §1125(a) ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff.” *Id.*, at 1392. Together, standing must rest upon a (i) pleaded economic or reputational injury, which (ii) is proximately caused actions within the zone of interest protected by the Lanham Act, here, Section 14.

In sum, the modern standard for standing in a Lanham Act case requires first a pleaded plausibility that the petitioner is within the zone of interests protected by Section 14, and second, to “plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant's” alleged Lanham Act violation. *Id.*, at 1395. Here, the Petition fails to “plead” either prong of the *Lexmark* standard to establish standing.

The requirement to “plead” and prove proximate causation of an injury fits squarely with the “is or will be damaged” provision in Section 14, and perhaps more so than with the “likely” damaged Section 43(a) provision that the Court applied in *Lexmark*.<sup>3</sup> The modern standard extends, but requires more than the “direct” and “commercial interest” aspects in *Cunningham v. Laser Golf*, and *Lexmark* holds that its two-factor standard “will provide clearer and more accurate guidance than a ‘reasonable interest’ test,” found in *Lipton*. *Id.*, at 1393. As applied here, the rule in *Lexmark* compels the conclusion that the Petition fails to plead standing.

The Petition does not plead, or even suggest, that this petitioner has any “injury” within the zone of interest. No “injury to a commercial interest in reputation or sales” was pleaded. *Id.*, at 1390. Indeed, no injury “proximately caused by” the Respondent’s actions under the Lanham Act was pleaded. Therefore, the Section 14 standing averment fails. The Petition here should be dismissed pursuant to Rule 12(b)(6), FED. R. CIV. PROC., and *Lexmark*.

Application of the *Lexmark* standard starts with the Court’s holding that “a direct application of the zone-of-interests test and the proximate-cause requirement supplies the relevant limits on who may sue.” *Id.*, at 1391. On the first of those “relevant limits,” petitioner SFM, LLC is a level removed from the zone of interest, because it does not operate the grocery stores owned and run by Sprouts Farmers Market, Inc., a publicly-traded Delaware corporation. The Petition was filed by an LLC that apparently does not use the marks. To meet the primary

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<sup>3</sup> Prior to *Lexmark*, the Circuit courts used different tests for Lanham Act standing. The 2<sup>nd</sup> Circuit required a “reasonable interest to be protected” and a “reasonable basis” for alleging harm. *See Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 113 (2d Cir. 2010), and that aligns with the “reasonable basis” prong in *Lipton*, *supra*. The 3<sup>rd</sup> Circuit followed *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983), and considered (1) nature of the alleged injury, (2) directness or indirectness of the asserted injury, (3) proximity or remoteness of the party to the alleged injurious conduct, (4) speculativeness of the claim, and (5) risks or complexity in assessing damages; and, the Ninth Circuit, found only commercial competitors had standing, upon demonstrating “that the injury is ‘competitive,’ or harmful to its ability to compete.” *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club*, 407 F.3d 1027, 1037 (9th Cir. 2005). The Supreme Court rejected all of these tests for standing, *Lexmark*, *supra*, 134 S. Ct. at 1389-90, which strongly indicates that the jurisprudential rules it sets forth for standing are to be followed in this forum.



requirement of *Lexmark*, the Petition must plead that this LLC “fall[s] within the zone of interests protected by the law invoked.” *Lexmark, id.*, at 1388. The Petition does not even plead use by the petitioner, and does not plead the services to which use pertains.<sup>4</sup> SFM, LLC is outside the zone of interests, and its Petition should be dismissed for failing to meet the modern pleading requirements for Section 14 standing.

For the second of *Lexmark* “relevant limits on who may sue,” the Petition has no well-pleaded averments of “injury” being “proximately caused” by Respondent. Even assuming the Petition implies an injury, there exists (what *Lexmark* refers to as) “a ‘discontinuity’ between the injury” and the pleader SFM, LLC, which does not operate any grocery stores. Furthermore, the second requirement in *Lexmark* combined with the textual difference between Section 14’s “is or will be damaged” and Section 43(a)’s “likely to” be, can be understood to result in a requirement to plead instances of actual confusion proximately causing an injury. By any measure, the Petition does not aver actual confusion, actual injury, proximate cause, or anything, other than form-book recitations.

Based on the foregoing, the standards spelled out in *Lexmark* are to be applied here. The Petition should be dismissed as failing to state that petitioner has Section 14 standing.

**C. Section 43(a) Averments Must Be Dismissed.**

The Petition avers in ¶s 6 & 7 that Respondent’s registered trademark “is likely to cause confusion or mistake, or to deceive the purchasing public” and that this “will cause confusion or deception,” and that “purchasers will be led to [a] mistaken belief” as to which “goods” have

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<sup>4</sup> Mistakenly, the Petition refers to “goods” in ¶s 6 & 7, even though both parties’ registrations identify “services.” A “federal trademark registration does not apply to a name or other mark in a vacuum, but attaches only to the use of the mark on specified goods ...[and] registrations designate specified classes of goods and do not create a presumptive exclusive right to use the mark for entirely different goods.” *S Industries, Inc. v. Kimberly-Clark Corp.*, 1996 WL 388427, (N.D. Ill. 1996).

been “sponsored, authorized, or warranted by” the petitioner. These averments, entirely or in large part, sound in §1125(a) of the Lanham Act, which regards use of a trademark being “likely to cause confusion, or to cause mistake, or to deceive as to the ... sponsorship, or approval” of the goods or services. Any Section 43(a) claim in the Petition must be dismissed.

It “is well settled that the Trademark Trial and Appeal Board cannot adjudicate unfair competition issues in a cancellation” proceeding. *Person's Co. v. Christman*, 900 F.2d 1565, 1570-71, 14 USPQ2d 1477, 1481 (Fed. Cir. 1990); registration); *Andersen Corp. v. Therm-O-Shield Int'l, Inc.*, 226 USPQ 431 (TTAB 1985) (Board may not entertain any claim based on Section 43(a) of the Trademark Act); and *Electronic Water Conditioners, Inc. v. Turbomag Corp.*, 221 USPQ 162 (TTAB 1984) (unfair competition and Section 43(a) claims are outside the jurisdiction of the Board).

These averments of deception, mistake and false designation in ¶s 6 & 7 of the Petition are not well-pleaded, and are threadbare, formulaic with no supporting factual basis recited. Those paragraphs are formulaic and merely restate the statutory phrasing as an enumerated allegation. It is settled that “where a complaint pleads facts that are 'merely consistent with' [statutory] liability, it 'stops short of the line between possibility and plausibility of “entitlement to relief.”” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557, 127 S. Ct. 1955, 1966, 167 L. Ed. 2d 929 (2007).

Further, the Section 43(a) averments in ¶s 6 & 7 of the Petition are outside the jurisdiction of the Board in a Section 14 cancellation proceeding. That claim and those averments in paragraphs 6 and 7 of the Petition should be dismissed.

**D.     Deception Claims Must Be Pled to Heightened Pleading Standards.**

Here, the Petition avers that marking “the goods of Respondent” with its registered mark for vending services tends to “deceive the purchasing public,” and that “Respondent's use” of its own registered trademark “will cause ...deception.” ¶s 6 & 7 of the Petition. These averments of deception are no different from allegations in another Lanham Act case that marks “actually deceived or have had the tendency to deceive a substantial segment of the audience” and have caused damage as a result. *Petube Systems, Inc. v. HomeTeam Pest Defense, LLC*, 2006 WL 1441014 (D. Ariz. 2006).

In that *Petube* case, the court dismissed the claim for failure to plead the ‘deception’ with the particularity required by Rule 9(b), FED. R. CIV. PROC., after it reviewed the authorities from several jurisdictions. There in *Petube*, and here, the pleading offers “nothing regarding the specific details surrounding [*the deception*] claim, ... only bare allegations in accordance with the elements of a Lanham Act claim [*and, as*] such, dismissal of this claim is proper.” *Id.* See too, *Vertical Web Media, L.L.C. v. Etailinsights, Inc.*, 2014 WL 2868789 (N.D. Ill. 2014); and, *Petróleos Mexicanos v. Intermix S.A.*, 97 USPQ2d 1403 (TTAB 2010).

Due to the Petition failing to offer any well-pleaded allegations or particulars related to the averred “deception,” those averments and any claim of “deception” should be dismissed pursuant to Rule 9(b), FED. R. CIV. PROC. At the least, any claim of “deception” should meet a heightened pleading standard, or be dismissed under Rule 8. See, e.g., *Creston Elecs. Inc. v. Cyber Sound & Sec. Inc.*, 2012 WL 426282 (D.N.J. 2012) (“District courts in the Third Circuit apply an intermediate pleading standard to false advertising claims under the Lanham Act, requiring ‘more particularity than traditional notice pleading under [*Fed. R. Civ. P.*] 8, but something less than the specificity required under Rule 9’”).

The Petition “must allege well-pleaded factual matter and more than ‘[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,’ to state a claim plausible on its face.” *Johnson & Johnson v. Obschestvo s Ogranichennoy*, 104 USPQ2d 2037, 2038 (TTAB 2012), citing *Iqbal*, supra, 556 U.S. 662. Paragraphs 6 & 7 in the Petition are threadbare, lacking in particulars and deserve to be dismissed.

**E. No Valid Ground for Section 14 Relief Was Pleaded.**

It is well-settled that to aver, or infer, a mere possibility of a ground for relief is insufficient to support a plausible claim. *Iqbal*, id., 556 U.S. at 679. No plausible ground for Section 14 relief was well-pleaded here. As the *Twombly* opinion stated, the factual averments “must be enough to raise a right to relief above the speculative level.” *Id.*, 550 U.S. at 555. The Petition here does not rise above speculative, unsupported formbook recitation, and it should be dismissed.

A leading Lanham Act case held, on similarly sparse averments, that “the complaint does not allege facts sufficient to show ... a likelihood of confusion as to the source of its products. ... ‘Although [*the pleader*] alleges ... ‘a strong likelihood of confusion in the marketplace as to the source of origin and sponsorship of the goods of the Plaintiff and the Defendant,’ such a conclusory and ‘formulaic recitation’ ... is insufficient to survive a motion to dismiss.” *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 610-11, 92 U.S.P.Q.2d 1003 (6<sup>th</sup> Cir. 2009). Here too, the averments are “insufficient to survive a motion to dismiss.” A “conclusory and ‘formulaic recitation’ of the elements of a trademark ... action is insufficient to survive a motion to dismiss.” *Myung Ga, Inc. v. Myung Ga of MD, Inc.*, 2011 WL 3476828 (D. Md. 2011), citing *Hensley Mfg.*, 579 F.3d at 611. “Although [*Petitioner*] does not need to present facts speaking to all of

the nine factors that make up the likelihood of confusion inquiry, a complaint is certainly insufficient when it falls to speak to any of them." *Id.*

The Petition has no well-pleaded averments supporting or detailing any valid ground for Section 14 relief. The threadbare, formulaic recitations in the body of the Petition are “merely consistent with” an elemental recitation of the law, and fail to reach past the “line between possibility and plausibility,” and so fail to state a claim cognizable under Section 14. *Iqbal, id.*, 556 U.S. 662. Respondent respectfully requests that the Petition be dismissed.

### **CONCLUSION**

The Petition fails the pleading requirements set forth herein, and for those reasons, it is respectfully requested that an Order of Dismissal be granted.

Respectfully submitted

Date: 14 NOV 2014

~ S ~ /Charles L. Thomason/  
Charles L. Thomason  
55 W. 12<sup>th</sup> Ave.  
Columbus, OH 43210  
thomason@spatlaw[dot]com  
Telep. (502) 349-7227  
Attorney for Respondent-Registrant

## CERTIFICATE OF SERVICE

I hereby certify that on this 14<sup>th</sup> day of November, 2014, I electronically filed the foregoing Points and Authorities in Support of Motion to Dismiss, and emailed a copy to the attorneys for the Petitioner, directed to the email address of the attorney indicated below:

Nicole M. Murray, Esq.  
Quarles & Brady LLP  
30 N. LaSalle St., Suite 4000  
Chicago, IL 60654  
Email: *Nicole.Murray[at]quarles[dot]com*

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